

Legal Standpoint: Compliance Policies and the Law

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In addition to support for the institutional mission, commitment to academic excellence, good governance, financial stability, student well-being, and attention to risk management, compliance is one of the fundamental fiduciary responsibilities of board members and senior leadership. As with other core functions, compliance overlaps legal issues and from a lawyer's perspective, six points regarding compliance hold particular importance for board members and senior leaders.

First, a lawyer's overriding duty is to uphold the rule of law. This includes striving to ensure—consistent with the lawyer's professional responsibilities—that the college or university client align its conduct with its legal obligations.

Second, most compliance obligations are based on state and federal statutes and regulations. A core responsibility of the institution's legal function is to analyze and interpret these laws and provide advice and counsel to colleges and universities about their compliance obligations.

Beyond statutes and regulations, compliance includes the obligations of colleges and universities under contracts, employment relationships, accreditation requirements, institutional policies, and best practices. Each obligation raises legal issues and requires legal analysis of the scope of the obligation and the legal implications of noncompliance.

Third, violations of compliance obligations have substantial legal consequences, including civil and criminal penalties, debarment from federal programs (research and financial aid), lawsuits by whistleblowers and the federal government, and program audits. Responding to and correcting any deficiencies in compliance programs require legal counsel.

Fourth, adequate institutional policies and procedures in a wide range of substantive topics are critical in any effective compliance program. For example, policies and procedures are the meat and potatoes of a good compliance program for Title IV (financial aid) of the Higher Education Act, Title IX of the Education Amendments Act, research misconduct, cost accounting (billing the federal government), employment discrimination, the Family and Medical Leave Act, the Fair Labor Standards Act, and a vast array of other substantive legal areas. All such compliance-related policies and procedures require legal input in drafting and implementation.

Fifth, an effective compliance program must have adequate training so employees understand their obligations. Compliance training programs must comply with the law and properly inform employees of the law's requirements.

Sixth, the federal sentencing guide-lines (which are widely viewed as the gold standard for judging an effective college or university compliance program) require that a good program address issues of "ethics" as well as "compliance." Ethical issues may arise in a variety of areas, including conflicts of interest, gift and entertainment policies, and questions of honesty and integrity in decision making and financial matters. Ethical obligations (conflicts of interest, for example) are based in significant part on legal standards, and unethical conduct frequently has serious legal implications for institutional liability. Put another way, legal advice is a critical component of "doing the right thing."

Board members and senior leaders must address many important issues related to institutional compliance. How should the program be structured? What are the proper reporting lines? What are the significant elements of the compliance plan? What are the substantive areas of greatest risk? How can the board best demonstrate the tone at the top? Whether or not the compliance function should report to the legal office—and there are arguments pro and con for doing so—legal issues arise in almost all aspects of an institution's ethics and compliance program. Orientation and training for board members and senior leaders should include these important legal and compliance issues.

